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Supreme Court of the United States

OCTOBER, TERM, 1952.

No. 39.

WILLIAM BAUMET,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

and

JULIE PETERS, individually and as Executrix under the Last Will and Testament of JOHN J. PETERS, Dec'd,
Defendant-Appellee,

and

HARRIET, JOAN, LIONEL and DWIGHT BAUMET, by Catherine Baumet, their Guardian *ad Litem*,
Defendants-Appellants.

BRIEF OF WILLIAM BAUMET, PLAINTIFF-APPELLANT AND HARRIET, JOAN, LIONEL AND DWIGHT BAUMET, INFANTS, BY CATHERINE BAUMET, THEIR GUARDIAN *AD LITEM*, DEFENDANTS-APPELLANTS.

LOUIS A. D'AGOSTO,
Counsel for Appellants.

Pandick Press, Inc., 22 Thames St., New York 6, N.Y. HA 2-2200

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	3
STATEMENT	3
ASSIGNMENT OF ERRORS	11
ARGUMENT:	
I.—Payment of accrued installments to the Estate of John J. Peters, Deceased, designated beneficiary, are prohibited by the National Service Life Insurance Act of 1940, Subdivisions (i) and (j)	12
II.—Payment of any installment to a person not designated in the policy and a stranger to the blood is forbidden by the Act, Subdivision (g), *supra*	16
III.—Julie Peters, an undesignated stranger, and John J. Peters, now deceased, are not persons entitled to take within the meaning of the Act	16
IV.—The dismissal of the plaintiff's complaint at the close of his affirmative case was a departure from the accepted and usual course of judicial proceedings	25
V.—The rights of the infant brothers and sisters of the insured are absolute under the National Service Life Insurance Act. They take to the exclusion of John J. Peters, now deceased and to the exclusion of Julie Peters, the undesignated stranger, in the event of the death or legal disability of the natural father	28

CONCLUSION: PAGE

It is respectfully submitted that the decisions of the Court of Appeals (*Baumet* v. *United States, et al.* 191 F. 2d. 194 and 177 F. 2d. 806) and the decision of the District Court (*Baumet* v. *United States, et al.*, not reported, Clancy U. S. D. J. filed November 3, 1950, S. D. N. Y.) should be reversed and the decision of the District Court (*Baumet* v. *United States, et al.*, 81 Fed. Supp. 1012) should be affirmed with costs in all Courts and that an order should be made directing the Government to make all payments to the appellant, William Baumet, or in the event of his death or legal disability, that all payments be made to the infant appellants, Harriet, Jean, Lionel and Dwight Baumet, by Catherine Baumet, their Guardian *ad Litem*..... 29

Cases Cited.

	PAGE
Amer. Nat'l Bank v. *U. S.*, 134 F. 2d 674	23
Baumet v. *U. S. et al.*, (81 F. Supp. 1012), (177 F. 2d 806), (339 U. S. 923, 973). (Cert. denied.)	2, 4, 11, 29
Baumet v. *U. S. et al.*, (Not Reported, Clancy U. S. D. J. filed S. D. N. Y. Nov. 3, 1950), (191 F. 2d 194). (Cert. granted.)	3, 29
Beanhart v. *U. S.*, 82 Fed. Supp. 652	15, 23, 25, 26
Bourbeau v. *U. S.*, 76 Fed. Supp. 778	23
D'Arcangelo v. *D'Arcangelo*, 277 A. D. 644, 102 N. Y. S. 2d 100	22
Harris v. *Morse*, 54 Fed. 2d 109	29
Kohn v. *Bates*, 275 A. D. 431, aff'd 300 N. Y. 722	15
Mansfield v. *Hester*, 81 Fed. Supp. 772	14, 23, 26
Neuhard v. *U. S.*, 83 F. Supp. 911	23
Niewandomski v. *U. S.*, 159 Fed. 2d 683	23
Richards v. *U. S.*, 93 Fed. Supp. 208	23
Strauss v. *U. S.*, 160 F. 2d 1017	24
Strunk v. *U. S.*, 80 Fed. Supp. 432	14, 23, 26
U. S. v. *McMaster*, 174 Fed. 2d 257	24
Washburn v. *U. S.*, 63 Fed. Supp. 224	14

Statutes Cited.

National Service Life Insurance Act of 1940, 54 Stat. 1008, c. 757, Title VI, Part I, Sec. 601 *et seq.* 38 U. S. C. A. 801 *et seq.*	3, 4
Section 602 (g) (i) (h3)	4, 12, 13, 16
Sections (i) (j)	12, 13
New York Civil Practice Act Sec. 347	11, 28, 29
Servicemen's Indemnity & Insurance Acts of 1951, Chap. 39 Public Law 23, 82nd Congress (Sec. 3)	13
United States Constitution, Fifth Amendment	28

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Opinions Below.

There were two opinions rendered by the District Court. John J. Peters, the designated beneficiary, died before the case came to trial. Julie Peters, his widow, moved to be substituted as Executrix. This motion was denied and the cross-claim of John J. Peters dismissed upon the basis

that his claims under the policy were extinguished by his death and that his Executrix had no interest in the policy (*Baumet* v. *United States, et al.*, 81 F. Supp. 1012).

Julie Peters, though not designated in the policy and a stranger to the blood, intervened individually, claiming to be in *loco parentis* and alleging preference over William Baumet, the natural father, and the surviving brothers and sisters of the insured.

She then appealed as Executrix. The Court of Appeals reversed the District Court and held that the right to those installments which accrued from the date of the death of the insured to the date of the death of the beneficiary, John J. Peters, became irrevocable for the beneficiary and should, therefore, pass to his estate (*Baumet* v. *United States,* 177 F. 2d 806).

The United States then intervened and petitioned the Court of Appeals for a rehearing which was denied.

William Baumet then petitioned this Court for a Writ of Certiorari which was denied. The United States filed a memorandum expressing the opinion that the decision of the Court of Appeals was "either erroneous or at least of doubtful soundness" and informed this Court "that the Veterans Administration proposed to adhere to its interpretation of the statute involved, notwithstanding the decision of the Court below" (*Baumet* v. *United States, et al.*, 339 U. S. 923, 973).

Catherine Baumet then intervened in the District Court as Guardian ad Litem of the infants Harriet, Joan, Lionel and Dwight Baumet, brothers and sisters of the insured. On the trial, the District Court dismissed the complaint of William Baumet, the natural father, upon the merits, at the close of the plaintiff's case; dismissed the cross-complaint of Catherine Baumet as Guardian ad Litem of the sisters and brothers of the insured and sustained the cross-

complaint of Julie Peters individually, as to installments accruing after her husband died, even though she was not one of the designated beneficiaries and a stranger to the blood and also sustained her claim as Executrix of her husband's estate as to installments which had accrued up to the date of her husband's death. (Opinion filed November 3rd, 1950, Clancy, J., S. D. N. Y. not reported.)

William Baumet as the natural father and Catherine Baumet as the Guardian ad Litem of the brothers and sisters of the insured, then appealed to the Court of Appeals, which Court affirmed the District Court (*Baumet* v. *United States, et al.*, 191 F. 2d, 194).

The appellants William Baumet and Catherine Baumet then petitioned this Court for a Writ of Certiorari, which was granted May 5th, 1952 (*Baumet* v. *United States, et al.*, 1951 Term, Vol. 96, p. 579).

Jurisdiction.

Writ of Certiorari granted May 5th, 1952. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Statement.

This action was brought against the United States pursuant to the National Service Life Insurance Act of 1940 as amended, 38 U. S. C. A. 801 *et seq.*, to recover the proceeds of a $10,000.00 policy issued to William Baumet, Jr., who died in military service October 26th, 1942. William Baumet, Sr., the appellant, is the insured serviceman's father. A cross-claim was filed in the action by John J. Peters, a maternal uncle who was designated as beneficiary. He died June 28th, 1948 before the action came to trial. The United States admitted liability. His widow, Julie Peters,

then intervened as Executrix, claiming the installments which matured before his death. She also claimed individually and in loco parentis to the insured, installments maturing after her husband's death.

Harriet, Joan, Lionel and Dwight Baumet, infant half-brothers and sisters of the deceased serviceman also intervened by their Guardian ad Litem, claiming that if William Baumet, the natural father, did not qualify in the contract of insurance within the meaning of the National Service Life Insurance Act of 1940, 54 Stat. 1008, c. 757, Title VI, Part I, Sec's 601, *et seq.*, 38 U. S. C. A. 801 *et seq.*,

> "Sec. 602 * * * (g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

that they then take as brothers and sisters of the deceased serviceman to the exclusion of John J. Peters, who died six months before his complaint was dismissed (*Baumet* v. *United States, et al.*, 81 F. Supp. 1012) and almost two and one-half years before the trial and also to the exclusion of Julie Peters, who is a stranger to the blood, was not designated beneficiary and is expressly barred from taking pursuant to subdivision:

> "(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined

in accordance with the order specified in subsection (H) (3) of this Section * * *."

Note the use of the word "only" in subdivision (g) *supra*.

William Baumet, Jr., the service man, enlisted in the U. S. Naval Reserve in Chicago, Illinois, June 25, 1941, at which time he was 21 years old and listed his home in their records as 619 Langdon Street, Madison, Wisconsin (R. 327, D's, Ex. NN) Thereafter, he recevied a $10,000.00 insurance contract from the National Service Life Insurance as an aviation cadet, effective October 3, 1941 (R. 106). He named therein as his beneficiary, a maternal uncle, designating him as follows: John J. Peters, "adopted father" (R. 106). It is undisputed that the serviceman was never adopted by anyone. It is further undisputed that the insured did not name any contingent beneficiary (R. XV).

On November 13, 1941, forty days after the insured obtained his policy, he changed his address on the official Navy records to read 408 Rugby Road, c/o John J. Peters, Brooklyn, N. Y. (R. 107). He was appointed 2nd Lt. in the U. S. Marine Corps and died in an airplane crash October 26, 1942.

Thereafter, John J. Peters filed a claim with the Veterans Administration for insurance benefits contending the relationship of loco parentis to the insured.

William Baumet, Sr., the natural father of the insured and appellant herein, also filed a claim contending that he never relinquished custody or control over his son; that he had supported him until he was 19 years of age and would have continued to do so thereafter had he known of his whereabouts and that he never abandoned him (R. Veterans' Admin. file). The appellant made numerous efforts to ascertain the whereabouts of his son from the time that

he was 19 years old to the date of his death but the same were fruitless (R. 31-39). It is evident that his whereabouts was concealed from his natural father. The only claims reviewed by the Veterans Administration were those of the natural father, the appellant herein, and the now deceased maternal uncle, John J. Peters (R. 2, Veteran's Admin. file).

The three adjudicators of the Veterans Administration found, after a thorough investigation lasting more than one and a half years, that William Baumet, Sr., the appellant herein and natural father of the insured, was entitled to the proceeds on the basis that he was the natural father, that he had never relinquished control or custody over his son; that he had never abandoned him (Veterans' Admin. file); that John J. Peters, the maternal uncle, now deceased, was not in loco parentis and therefore not entitled to any of the proceeds (Veterans' Admin. file).

On May 2, 1944, the Administrator overruled the three adjudicators, even though he found that:

> "There are on file copies of numerous letters from the insured to his father, written during his boyhood and while he was at college through 1938; of excerpts from the boy's diary and while he was a member of his father's household following his mother's death; and of receipts of money. This evidence shows that the relations between the boy and his father were very cordial and that the father made substantial contributions to his son's support and kept in touch with him following the separation of the parents".

He further found:

> "The father asked the insured to come home but refused to consent to his return to the University of Wisconsin".

(Dec. of Administrator Breining. Dated May 2, 1944).

At the close of the appellee Julie Peters' case, her attorneys conceded that the evidence submitted by them did not support their claim that either John J. or Julie Peters was in loco parentis prior to November, 1938 at which time the insured was 19 years old (R. 326-7).

On June 2nd, 1936, after the insured's mother died, he lived with his father, the appellant herein, who had remarried and with his then born half-sisters, Harriet and Joan, two of the infant appellants herein. He occupied his own room for 15 months in a 4 room apartment occupied by the appellant, his stepmother and infant sisters. The insured then left to attend the University of Wisconsin (R. 102). The appellant, being a person of limited financial means, was compelled to use in addition to his personal funds, about $900.00 out of a balance of $1,250.00 then remaining in the account of the insured towards his education (R. 28-31).

These withdrawals were made by the father and son jointly with the approval of the Surrogate.

On November 15th, 1938, the insured abandoned college without his father's consent or knowledge and turned up in Jacksonville, Florida, in December of 1938 (R. 31, Plaintiff's Exhibit 11).

Before the insured left college without his father's knowledge, he arranged with a classmate, Silk, to write his father letters pretending to come from him. The father, being under the impression that the insured was still in college, sent him such sums as he could. These were received by Silk and transmitted to the insured. Silk would write letters to the father simulating the insured's language and signing himself, as son, "Bill" (R. 362-8).

Silk explained the deception as follows:

> "He had been in rather bad health from the time he came back. He had been in an automobile acci-

dent driving to Wisconsin from New York. And he was not doing well in his studies in that semester. He was also rather disconsolate over a girl that he was going with and who transferred her affections. His wrestling was off. All the things that worry a sophomore. And there was a kind of literary despair and a romantic determination to see life and various things of that kind. He decided in November to leave the University" (R. 404).

The insured returned to New York in December of 1938. The first inkling that the appellant had of his son's leaving college was when he received a letter addressed, "William Baumet" from the University advising the son that in view of his severance from college, he could continue his studies by correspondence (R. 31, Plaintiff's Exhibits 9 for Identification and 10).

The insured returned to New York the last week of December, 1938, and obtained work at Dard's, Inc. and the Flatbush Auto Discount Corp. in New York City (R. 309-310).

In January of 1939, the insured and his uncle, John J. Peters, visited the appellant at his place of employment and Peters demanded that the appellant return the insured to the University of Wisconsin. The appellant refused this request, stating that he wanted his boy home where he could exercise parental control and requested that his son matriculate at a college nearby in view of the boy's previous escapades (R. 32-3). The appellant's refusal to permit his son to return to the University of Wisconsin embittered him (R. 33, Exhibit 9 for identification).

He then communicated with an uncle, Robert Peters, who refused to become involved (R. 258).

The insured then charged the appellant with mismanagement of guardianship funds. The Surrogate of New York County appointed the late Warren C. Fielding to

inquire into this complaint and after a thorough investigation found no evidence of mismanagement and further found that the appellant wanted the boy back home (Plaintiff's Exhibit 9 for identification). Notwithstanding a stipulation by counsel that this report be admitted in evidence, the District Court excluded it (R. 164, 368-9). The appellant, being deeply grieved by his son's conduct, requested that he be relieved as Guardian of the property of his son and that the balance of $341.00, then remaining in the fund, be administered by someone else (R. 166, 169).

Finally, in May of 1939, John J. Peters, now deceased, was appointed Guardian of the boy's property, jointly with the Clerk of the Surrogate's Court. In the Petition, the boy gave his address as 1086 2nd Avenue, New York City. It is to be noted that this, as late as May, 1939, was not the address of John J. Peters, the designated beneficiary, who at all times, resided in Brooklyn, N. Y. (R. 168).

In May, 1939, the insured severed his employment with Flatbush Auto Discount Corp. and returned to Wisconsin. He stopped off at Madison and arranged for reentry to the University in the fall of 1939 (R. 106, Stip.). In June of 1939, he obtained employment at the Lakeside Laboratories in Milwaukee, Wisconsin, where he worked until September of 1939 and then went back to the University (R. 313).

At the insured's request, John J. Peters, withdrew $150.00 from the insured's trust fund so that the insured could enter the University. The balance of the insured's trust fund was to be withdrawn at the rate of $25.00 per month (R. 302-3). While at the University, the insured worked part-time at the Barg & Foster Candy Co. of Madison, Wis. from October, 1939 to January, 1940 to supplement his withdrawals from his trust fund (R. 313). In January, 1940, the insured again severed his connection with the University (R. 55-9, Plaintiff's Exhibit 11).

He then returned to New York and worked for the Carr-Lowery Glass Co. at 500 5th Avenue, New York City listing as his home, 110 E. 87th Street, New York City.

He worked there from March 11, 1940 to June 29, 1940. (R. 315-319, Plaintiff's Exhibit 20). It is to be noted that this address was not the address of the Peters family.

He then returned to Wisconsin and obtained employment with the Quartermaster Dept., Wisconsin National Guard, Camp Douglas, Wis., as a civilian, where he worked during the summer months (R. 59, Stipulated).

He was again admitted to the University of Wisconsin, this time on an athletic scholarship, without tuition and again obtained employment with the Barg & Foster Candy Co., in Madison, Wisconsin, to supplement $15.00 per month that he was receiving from his own trust fund and other sums from an uncle, Milton Loeb. He worked for this company from June, 1940 to June, 1941, giving his address as 4206 Yuma Drive, Madison, Wis. (R. 314).

He also earned additional sums at college, as described by his college chums, Silk and Viskocil (R. 115, 354, Plaintiff's Exhibit 22, pp. 16, 17, Defendant's Exhibit O).

In June, 1941, he left college for the third and last time, stating in his own handwriting in a letter to his maternal uncle, John J. Peters:

> "I have had pretty tough sledding since Milton stopped sending me money • • •. I borrowed dough all around here from some of the fellows and I made a miserable mess of school this semester • • •. But that is all behind me and I am going to forget it. I am in the Navy now" (R. 173).

It is to be noted that this letter was never answered by either John J. or Julie Peters and that the Milton referred to in the letter is one, Uncle Milton Loeb.

The last time that the insured left College, he owed the University Loan Fund about $50.00 for loans made during the school year 1940-1941, which loans still remain unpaid (R. 436), although Julie Peters, the appellee, testified that she had paid the same (R. 221).

Assignment of Errors.

1. The District Court erred when it directed payment of accrued installments to the Estate of John J. Peters.

2. The District Court erred when it directed payment of installments which had accrued after the death of John J. Peters to his widow, Julie Peters, individually, a stranger to the blood who was never designated beneficiary and was never intended as such by the insured.

3. The District Court erred when it excluded letters from the insured and from the insured's mother to the natural father, although they had been stipulated by counsel to be admissible in evidence. The District Court also erred when it excluded the insured's diary. This evidence was material to the issue of loco parentis.

4. The District Court erred when it dismissed the plaintiff's complaint at the close of his affirmative case and thereby deprived him of his constitutional right to a trial of the issues of fact.

5. Insofar as the appellants, Harriet, Joan, Lionel and Dwight Baumet were concerned, the District Court erred when it disregarded Section 347 of the Civil Practice Act of New York and admitted evidence concerning personal transactions or communications between the decedent and the appellee, Julie Peters, an interested person.

6. The Court of Appeals erred when it reversed the Court below (*Baumet* v. *United States*, 81 Fed. Supp. 1012)

and again when it affirmed the trial Court below. (Clancy, J., opinion filed November 3, 1950, not reported).

7. The Court of Appeals erred when it found that the rights of the infant brothers and sisters of the insured were contingent upon the rights of the natural father, notwithstanding the erroneous concession of counsel for the infants in that Court.

ARGUMENT.

I.

Payment of accrued installments to the estate of John J. Peters, deceased, designated beneficiary, are prohibited by the National Service Life Insurance Act of 1940, subdivisions (i) and (j).

"(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordanee with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h).

"(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event

> that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made" (38 U. S. C. A. 802(g)(j).

It is respectfully submitted that the foregoing are the three conditions imposed by Congress before payment of any installments could be made to a beneficiary.

1. That he be "alive to receive such payments".

2. That "no person shall have a vested right to any installments."

3. That "No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary."

It is respectfully submitted that no installment is due and payable to anyone in the case at bar until this Honorable Court, the Court of last resort, has spoken.

Section 3 of the Servicemen's Indemnity and Insurance Acts of 1951, Chapter 39, Public Law 23, 82nd Congress, although enacted to cover cases arising out of the Korean conflict, reasserts the intention of Congress that no payment shall be made to the Estate of any deceased person and that in the event of any disability of any beneficiary or contingent beneficiary to take, then the beneficiary or beneficiaries next entitled to priority under the Act shall take.

"Sec. 3 • • •

> Any installments of an indemnity not paid to a beneficiary during such beneficiary's lifetime shall be paid to the named contingent beneficiary, if any; otherwise to the beneficiary or beneficiaries next entitled to priority; Provided that no payment shall be made to the estate of any deceased person."

The foregoing Section seems to apply to the case at bar.

Assuming without conceding that the proof establishes that John J. Peters was in loco parentis, the fact remains that he was not alive to take and that the installments were not payable to his Estate and therefore the rights of the natural parent, the appellant, William Baumet, Sr., were reinstated under the cases of *Strunk* v. *United States* (80 Fed. Supp. 432), and *Mansfield* v. *Hester* (81 Fed. Supp. 737). As to *Julie Peters*, the argument applies with even greater weight because she was never designated.

In any event, the next entitled to priority under the Act, would be the brothers and sisters of William Baumet, Jr., not Julie Peters, the appellee herein.

The following language in *Strunk* and *Mansfield*, *supra*, is significant:

Strunk v. *United States*, 80 Fed. Supp. 432, page 435:

> "The assumed parental relationship of the grandfather affected the natural relationship of the plaintiff only during the life of the grandfather. Upon his death, all rights of the plaintiff, the only living parent of the insured were revived."

Mansfield v. *Hester*, 81 Fed. Supp. 772, page 776:

> "* * * Even if we assume that the rights of the plaintiff as a natural parent were for a time superseded by those of the grandmother, standing in loco parentis to her grandson, yet at the grandmother's death, plaintiff's rights were revived. She being the only living parent, and never having relinquished her parental rights or obligations, she is entitled to claim the insurance benefits."

Note *Washburn* v. *United States*, 63 Fed. Supp. 224 construing the subdivisions of the Act involved at bar, page 228:

"As no benefits were paid to such 'principal' beneficiary during her lifetime, the entire amount thereof was, under subsection (i) payable in accordance with the provisions of subsection (h)."

See also *Bearhart* v. *United States*, 82 Fed. Supp. 652 at page 655:

"Section 802 (j) precludes payment 'to the heirs or legal representatives'. Only survivors within the 'permitted class' may be named as beneficiaries."

Matter of *Kohn* v. *Bates*, 275 A. D. 431, aff'd. 300 N. Y. 722, although constructing Chapter 574 of Laws of 1947 concerning veterans' bonus payable by the State of New York is interesting and persuasive.

275 A. D. 431 at page 434:

"The case appears to be directly in point to the extent at least that it establishes that a bonus is a mere expectancy revocable at the will of the Legislature and does not constitute property in the sense that it would pass to the executor as an asset of the original claimant's estate. (See Harlan *v.* Archer, 79 F. 2d, 673, 677, certiorari denied 296 U. S. 656) for a general discussion of the question involved."

Again at page 435:

"The language of the statute leads to the conclusion that the persons eligible to the bonus, whether veteran or next of kin, must be alive in order to be entitled to its payment and that neither the estate of the veteran nor of the next of kin, regardless of whether an application for the bonus has been made, is entitled to payment of the same in the event that such applicant dies prior to payment."

Note the language in the New York Court of Appeals, 300 N. Y. 722:

> "* * * that the next of kin mentioned in the statute must be alive in order to receive payment of the bonus, and that the Estate of such next of kin who dies before receiving payment has no right thereto, * * *."

II.

Payment of any installment to a person not designated in the policy and a stranger to the blood is forbidden by the Act, subdivision (g), *supra*.

It is respectfully submitted that the use of the word "only" by Congress in Section 602, (g) *supra*, is controlling in the contract of insurance at bar. By the terms of the foregoing subdivision, Julie Peters, the undesignated stranger, is clearly barred.

III.

Julie Peters, an undesignated stranger, and John J. Peters, now deceased, are not persons entitled to take within the meaning of the Act.

It is respectfully submitted that the Courts below overlooked the following material evidence, which indicated that the insured was continually employed and self-supporting after he left his father's home to the time that he entered the service. Letters from his employers, letters from the Dean of the University of Wisconsin and the testimony of Julie Peters on cross-examination substantiate these facts. It is undisputed that he worked at the following places:

Dard's, Inc., 341 Madison Ave. N. Y. C.	$ 6.20	Dec. 1938 (R. 308)
Flatbush Auto Disc. Corp., 1327 Flatbush Ave. B'klyn.	199.10	Jan.-May, 1939 (R. 309)
The Lakeside Labs. Inc., 2344 N. Oakland, Milwaukee, Wisc.	213.45	June, 1939 Sept., 1939 (R. 313)
Barg & Foster Candy Co., 200 S. 2nd St., Milwaukee, Wisc.	49.75	Oct.-Dec. 1939, Jan. 1940 (R. 313)
Carr-Lowrey Glass Co., 500 Fifth Ave. N. Y. C.	195.00	Mar.-June, 1940 (R. 315) (R. 319)
Barg & Foster Candy Co., 200 S. 2nd St., Milwaukee, Wisc.	138.00	Oct. 1940, May 1941 (R. 313)
Civilian employment at Quartermaster's Depot at Camp Douglas, Wisconsin (Stipulated by Counsel)		(Earnings unknown) Summer, 1940.
Other earnings in depositions of Leonard Silk and E. Viskocil in evidence.		(R. 115, 354)

The entire balance of trust fund amounting to $341 withdrawn by Peters.....		(R. 304) (R. 312)
No tuition fees required at University of Wisconsin for year 1940-1941, amount waived (Stipulation in evidence).....	200.00	
Loans contracted at the University in 1941 during alleged period of "in loco parentis"	75.00	(R. 436)

An examination of Julie Peters' claims reveals a story which is a figment of the mind conceived to meet the exigencies of the situation. It was apparently manufactured to divert all of the proceeds of the $10,000.00 insurance policy from members of the immediate family of the insured to herself, an opportunity she considered well worth the effort. However, the web of her story, built upon an uneasy structure arising out of an alleged residence by the insured with her for only a short period of four or five months during which he was employed, disintegrates because of the glaring contradictions and inconsistencies flowing out of her own mouth.

The following excerpt from a letter written by the insured to John J. Peters introduced by the appellee herself is enlightening indeed on the issue of loco parentis and the manner in which the Peters family allegedly supported him:

> "I have had pretty tough sledding since Milton stopped sending me money. * * *. I borrowed dough all around here from some of the fellows and I made a miserable mess of school this semester. * * * But

that is all behind me and I am going to forget it. I am in the Navy now" (R. 173).

It is undisputed that the "Milton" mentioned in this letter is neither John J. nor Julie Peters.

Here is another classic example of Julie Peters' evidence on the issue of loco parentis:

> "Q. As you sit there now do you have a single letter that was ever addressed to you personally by William Baumet, Jr.? A. There were hundreds of them but I tore them up" (R. 173).

It is beyond belief that a person would tear up each and every letter received from a so called endeared one in active service in time of war, as soon as it was read.

The story Julie Peters tells of selling her furs to buy clothes for the insured (R. 214), and under cross-examination that her son Lester living with her was worth $100,000 (R. 314) and that her husband averaged $100 a week (R. 301), and the tale of taking in sewing to help the boy while admitting he was employed (R. 215-217) and of sending him $2.00 in each letter she sent him, although he was an officer in the Navy, does not ring true.

Note the glaring contradiction from Julie Peters own mouth:

She testified that the insured, a boy 19 years old, lived with her for about four or five months and of his then running away and living in a furnished room at 1086 Second Avenue, Borough of Manhattan, a few doors away from an aunt, Betty Loeb, and after finding him she brought him back to Brooklyn, and after staying there a few days, the insured again left to go to work in Wisconsin (R. 222, 284-7, 297).

In those few days, the insured filed a petition in the New York County Surrogate's Court, again stating his address as 1086 Second Avenue, Manhattan (R. 168, 284-7, 293, 6, Defendant's Exhibit Q).

When he went to Milwaukee a few days later, he gave his address as 1041 East Ogden Avenue, Milwaukee.

Under these circumstances, can it fairly be said that the boy considered Julie Peters as his "mother"?

Julie Peters placed three so-called "endearing" cards, written by her and John J. Peters to the insured, in the dead boy's box after the box was returned by the Navy (R. 235-7) and repudiated this testimony the following day after she realized that the contents of the tin box were a matter of official record (R. 269-271).

This was indeed a brazen and clumsy attempt by her to build up a claim of loco parentis.

Her claim of daily allowances to the boy out of her funds, though supposedly in want herself, with the boy employed continuously in over six jobs during the alleged period of in loco parentis is preposterous (R. 309, 313, 319, 469).

Julie Peters' testimony shows that Peters withdrew every cent of the $341.00 balance of the boy's trust fund for the boy, a matter which was not clear to the Appeals Court in its Opinion (R. 312).

The award to Julie Peters cannot be justified on the basis that it was made to carry out the intention of the insured. She neither pleaded nor proved nor ever contended such an intention nor was it so found in the Courts below. He did not designate her as a beneficiary. There is not a single letter or scrap of writing in existence (R. 277-8) or oral evidence that he intended Julie Peters to share in the proceeds. He made no allotment to her (R. 331). He never

addressed her in any terms that would signify that he considered her "a mother". He never made a gift to her or sent her a memento of any kind. He did not mention her in his holographic Will in which he left his assets to his college chums (R. 111), and there is not a single receipt or acknowledgement of moneys that she alleges she and John J. Peters sent him even when he was a commissioned officer and while she was allegedly in "want" (R. 323).

The insured never referred to John J. Peters as his "father". He always addressed him either as "Jack" or "Uncle Jack" (R. 232, 235). In one letter he stated "you have been a good friend and a good uncle" (R. 234). In another (Defendant's Exhibit T, R. 174) the insured wrote him requesting a $5.00 loan and addressing him as Uncle Jack.

The appellee introduced only one letter from the insured to his uncle Jack prior to the insured's entry into the service (Defendant's Exhibit R, R. 169).

Strange indeed how the so-called father, John J. Peters, was able to produce only one letter written to him by the insured prior to entry into service and Julie Peters not able to produce any, either prior or subsequent to the insured's entry into service.

If the rights of the father, brothers and sisters of the insured are to be wiped out and the family relationship destroyed by an undesignated stranger, then it should be done by clear and convincing evidence of the highest probity and indisputable integrity.

The appellants respectfully submit that Julie Peters was not such a person as to free her from the implications that her claim was conceived in bad faith.

Her testimony on cross-examination indicated that she was not the legal aunt of the insured under New York Law.

While there is no desire on the part of the appellants to question the legality of her marriage to Peters, it becomes necessary in the instant case on the issue of her credibility and legal status (R. 264-9), (Plaintiff's Exhibit 17, Marriage License). Her marriage to Peters was based upon false representations sworn to by her that her first husband was "dead" when as a matter of fact he was still alive at the time of this trial (R. 265). Her first husband had secured a divorce in Supreme Court, Kings County.

It is evident that the motive behind her false sworn statement was to avoid a legal impediment forbidding her to remarry in New York State.

See *D'Arcangelo* v. *D'Arcangelo*, 277 A. D. 644, 102 N. Y. S. 2d, 100, which holds that

> if a woman forbidden by New York divorce decree to remarry until death of former husband remarries before death of husband without permission of the Court, the marriage would be void and the woman guilty of bigamy.

It is also to be noted that Peters himself on the same marriage application swore falsely that this was his "first" marriage when as a matter of fact, he too had been previously married and divorced (R. 294-5).

There was no diversity of opinion prior to the instant case as to an undesignated person claiming "in loco parentis" to the exclusion of the surviving members of a serviceman's immediate family.

The Courts have been emphatic in the rejection of such claims even where the evidence tends to support a relationship of "loco parentis" and a designation.

The Courts have taken cognizance of the possibility of bad faith and extensive litigation in the presentation of such claims.

See *Mansfield* v. *Hester*, 81 Fed. Supp. 772:

> "It must be remembered that Lillie Hester claims the proceeds of this insurance, not as a designated beneficiary, but under the distribution provisions of the statute; and therefore the reasons which many Courts have given for construing the term 'in loco parentis' liberally in order to carry out the wishes of the insured are not applicable here" (p. 775).
>
> "Even if we assume that the rights of the plaintiff as a natural parent were for a time superseded by those of the grandmother standing in loco parentis to her grandson, yet at the grandmother's death, plaintiff's rights were revived. She being the only living parent, and never having relinquished her parental rights or obligations, she is entitled to claim the insurance benefits" (p. 776).

Bourbeau v. *United States*, 76 Fed. Supp. 778;
Bearhart v. *United States*, 82 Fed. Supp. 652.

As to a person designated "in loco parentis" and not of family kin, the leading authorities supporting the theory of strict and technical construction of such a designation, and which have rejected such claims as not meeting the standard proof required to displace the immediate family kin, are:

Amer. Natl. Bank v. *U. S.*, 134 F. 2d, 674;
Mansfield v. *Hester, et al.*, 81 F. Supp. 772;
Strunk v. *United States*, 80 F. Supp. 432;
Neuhard v. *United States*, 83 F. Supp. 911;
Richards v. *United States*, 93 F. Supp. 208.

Niewandomski v. *United States*, 159 Fed. 2d 683:

> "Her purpose was to aid and assist rather than to assume any parental obligations or exercise such parental control as continues to exist in the case of

an adult child continuing to live in the parent's home" (p. 686).

"His self support and independence of action are also important factors" (p. 686).

"* * * Kindness and generosity, even on the part of near relatives, are not the same as assuming the common law relationship of in loco parentis" (p. 686).

United States v. *Mac Master*, 174 F. 2d, 257:

"The fact that Congress selected to express its intention a Latin phrase which has a definite meaning in law strongly suggests that it was used in a technical sense. That sense is defined in Black's Law Dictionary: 'In the place of a parent; charged factitiously with a parent's rights, duties and responsibilities'. 42 C. J. S. In page 489, adds: 'More specifically, the relationship which a person assumes toward a child not his own, holding the child out to the world as a member of his family toward whom he owes the discharge of parental duties';" (p. 259).

Strauss v. *United States*, 160 F. 2d, 1017:

"The only issue is whether the Court below correctly concluded that the defendant did not stand in loco parentis to the insured. It is clear that the insured thought she did, and that he wished her to receive the proceeds of the policy, but this is not decisive of the question" * * * (p. 1018).

"Without a doubt there was a strong bond of affection between the defendant and insured, but that is not sufficient to establish the fact that she stood in loco parentis" * * * (p. 1018).

"Foremost among these obligations is the responsibility for the support of the child" * * * (p. 1018).

"However, the parent of a minor generally is responsible for the support of the child and we believe that such responsibility is necessary to establish the relationship of one in loco parentis" (p. 1019).

In the foregoing cases the kindness and favors bestowed upon the insured during his lifetime by those claiming in *loco parentis* and designated were far more substantial and convincing than those of John J. Peters, now deceased, or Julie Peters, the undesignated stranger and still they were rejected by the Courts.

The *Bearhart* case, *supra*, is also significant:

"In my opinion, the claim of the co-defendant must fail because she has not carried her burden of proof. Further, as between a natural mother and one claiming to have stood in loco parentis, it will be presumed that the natural mother last bore the relationship of parent. Weighing the facts in this bitterly contested case, the exclusion of the co-defendant from designation as a beneficiary by the insured tips the scales in favor of plaintiff" (p. 656).

IV.

The dismissal of the plaintiff's complaint at the close of his affirmative case was a departure from the accepted and usual course of judicial proceedings.

The concluding remark of the District Court in its Opinion is a sad commentary of the father's plight in his efforts to be fairly adjudged against accusations that he was not a good father.

"Although the Court dismissed the plaintiff's complaint at the close of the plaintiff's case, this

decision has been arrived at on the entire case" (R. 422).

The reading of the whole Opinion with its indictment of the father to justify the decision, based almost entirely on testimony freely offered by Julie Peters during the enforced "absence" of the father as a party to the action from further participation in the trial after the dismissal of his complaint must indeed raise the question whether the findings of Fact and Conclusions of Law based thereon were correct and whether the father was thereby deprived of his substantial rights.

See *Strunk* v. *United States, supra:*

> "Parental relationship when once established is presumed to continue and one who avers its discontinuance has the burden of proving it. * * *". * * * "In every case the showing of such relationship, in the absence of anything more, makes out a prima facie case for the parents, which can be overcome only by the most solid and substantial reasons, established by plain and certain proofs. The burden of proof is not on the parent but on the opposing party, even where the latter has the actual custody of the child" (p. 435).

See also *Mansfield* and *Bearhart, supra.*

The plaintiff came to court clothed with the undisputed fact, conceded in the pleadings that he was the only natural surviving parent. As such he was entitled to the presumption and benefit of that status until proof to the contrary was adduced and as such entitled to be a party to any and all proceedings in a challenge to his status as a parent. But he was figuratively thrown out of Court at the end of his affirmative case (R. 76).

The Trial Court erred when it excluded letters from the boy to the father indicating support, maintenance, retention of control over the boy, parental guidance and bonds of affection while the boy was living with his mother. The Court erred when it excluded letters from the boy's mother to her former husband, the appellant herein, indicating receipt of moneys from the appellant and the existence of a cordial relationship even though all of these letters were stipulated by counsel (R. 20).

The Court erred when it excluded the boy's diary which was written by the boy while he lived with the appellant after his mother died. This diary showed exchange of gifts, educational guidance and progress, love and affection among father and son, and half-sisters and brothers, parental control, all matters vital to plaintiff's case. Nowhere in this diary did the insured refer to either John J. or Julie Peters over a period of 15 months (R. 63, Plaintiff's Exhibit 13 for Identification).

The Trial Court erred when it excluded, despite stipulation of counsel, the report of Warren C. Fielding, Esq., special guardian, dated February 16, 1939, appointed by the Surrogate's Court indicating that the father appealed to the son to return home after he left at 19 years of age (R. 49, 164).

There does not appear to be a single recorded instance that can be cited to sustain such a ruling with its resulting prejudices. His case was foreclosed and he was deprived of the fundamental right to defend his honor and status as a father against attack and to rebut the claim of an uncle, then deceased, and an undesignated stranger.

It being conceded that Baumet Sr. was the natural father of Baumet Jr. and as such entitled to the presumption that once a father always a father, then it is submitted

that the plaintiff had made out a prima facie case in the District Court and as such was entitled to a full and fair trial on all of the issues of fact involved.

V.

The rights of the infant brothers and sisters of the insured are absolute under the National Service Life Insurance Act. They take to the exclusion of John J. Peters, now deceased and to the exclusion of Julie Peters, the undesignated stranger, in the event of the death or legal disability of the Natural Father.

The infants were deprived of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States when the trial Court admitted evidence over objection of counsel and disregarded the provisions of Section 347 of the New York Civil Practice Act (R. 210).

Julie Peters' testimony relating to conversations, communications and transactions had with the deceased in his lifetime are prohibited by Section 347 because she was a "party or person interested in the event" and thereby stood both individually and as Executrix and still stands in a position of personal profit or gain. A party or person interested in the event in such circumstances is "disqualified from testifying".

The argument that plaintiff Baumet Sr. may have "opened the door" is untenable insofar as the infants are concerned. The four infant appellants appeared by Guardian ad Litem, they are separate and distinct parties to this action and appeal and their rights cannot be prejudiced by Baumet Sr. When the Trial Court dismissed Baumet Sr.'s complaint, he was ruled out as a party to the action and the trial then began between the infants and Julie Peters which was an entirely separate suit.

The District Court was bound to provide the infants with the protection of Section 347, *supra*. *Harris* v. *Morse*, 54 Fed. 2d, 109.

It is submitted that the rights of the infants are absolute under the Act, if for any reason the natural father dies or becomes legally disabled, and not contingent as found by the Court of Appeals. The Court of Appeals erred when it refused to review the infants' appeal and agreed with the erroneous concession made by counsel for the infants in that Court. It is submitted that the rights of infants cannot be prejudiced or surrendered by counsel and that the Courts are ever zealous to protect their rights.

Conclusion.

It is respectfully submitted that the decisions of the Court of Appeals (*Baumet* v. *United States, et al.* 191 F. 2d 194 and 177 F. 2d 806) and the decision of the District Court (*Baumet* v. *United States, et al.*, not reported, Clancy U. S. D. J. filed November 3, 1950, S. D. N. Y.) should be reversed and the decision of the District Court (*Baumet* v. *United States, et al.* 81 Fed. Supp. 1012) should be affirmed with costs in all courts and that an order should be made directing the government to make all payments to the appellant, William Baumet or in the event of his death or legal disability, that all payments be made to the infant appellants Harriet, Joan, Lionel and Dwight Baumet, by Catherine Baumet, their guardian *ad litem*.

Respectfully submitted,

Louis A. D'Agosto,
Counsel for Appellants.